No. 95-968

Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARK EINZIGER,

Petitioner,

—v.—

ARTHUR JACOBS, DONALD HELLER, ELLIOT BLACK, and KENNETH JACOBS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Arthur Jacobs, Donald Heller, Eliot Black and Kenneth Jacobs (hereinafter collectively referred to as the "Shareholders" or "respondents") respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Third Circuit's decision in this matter.

OPINIONS BELOW

The September 20, 1995, two-page "judgment order" of the United States Court of Appeals for the Third Circuit is unpublished and is reproduced in the appendix to the petition for

certiorari at page A-1 through A-2.[1] The November 9, 1995, order of the United States Court of Appeals for the Third Circuit denying petitioner's suggestion for rehearing *en banc* is reproduced at Pet.App.9a.

The January 26, 1995, opinion and order of the U.S. District Court for the District of New Jersey granting defendants' motion for summary judgment are unpublished and are reproduced at Pet.App.3a-7a (the opinion) and Pet.App.8a (the order). Because the petition for writ of certiorari was filed before the District Court's entry of an order in lieu of mandate on December 19, 1995, the order is reproduced in the appendix to this brief at 1a.[2]

COUNTERSTATEMENT OF THE CASE

A. Preliminary Statement.

This matter involves interpretation of New York and New Jersey state common law regarding (1) the application of an arbitration clause to claims which could have been asserted in arbitration to bar the subsequent litigation of those claims; (2) judicial estoppel principles precluding a litigant from seeking recovery in a subsequent action premised upon the unenforceability of a contract after establishing the validity of that contract in an arbitration proceeding; and (3) rejection of alter ego theories because of lack of evidence of any corporate impropriety or abuse of the formalities of corporate existence. Neither the decision below nor the record raises the Question Presented in the petition.

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[1] Hereinafter citations to the appendix to the petition will be stated as: "Pet.App. __a"; citations to the petition itself will be stated as "Pet. __."

[2] Hereinafter citations to the appendix to this brief will be referred to as "RA__a."

In proceedings below, which followed an arbitration award finding that Mark Einziger (hereinafter referred to as "Einziger" or "petitioner") was entitled to damages against Stacey Allison, Ltd. ("Stacey Allison") for breach of Einziger's Employment Agreement, Einziger sought to compel payment of the arbitration award by the Shareholders. Petitioner's Complaint in the United States District Court alleged that the Shareholders had fraudulently induced him to enter into the very same Employment Agreement. He argued (although he did not plead) that the Shareholders had paid for the defense of the arbitration and were therefore personally bound by the result.

The District Court held that the finding of the validity of the Employment Contract and its breach foreclosed Einziger from seeking to set aside the Contract. It further found that Einziger was obligated to assert all of his claims in the arbitration and, therefore, could not pursue the Shareholders in District Court on some different theory from that presented in the arbitration. The District Court's judgment was affirmed, without opinion, by the Third Circuit Court of Appeals.

Neither the District Court nor the Court of Appeals discussed Einziger's argument that the Shareholders' alleged paying for defense of the arbitration bound them by the result. Presumably, there was no discussion because the claim was never plead, nor was there any evidence before the District Court from which the Court could conclude that the Shareholders had controlled the arbitration: not an affidavit, not a check stub, not an entry in a book of account. All that was presented was the bald statement of counsel for petitioner that the Shareholders paid for the defense.

In an effort to circumvent the record below, petitioner has concocted a conspiracy among the Shareholders, the District Court and the Third Circuit Court of Appeals. *See* Pet.4-8. The opaque theory seems to be that the Courts subverted justice by ignoring alleged control of the arbitration, thereby obviating the necessity of dealing with controlling precedent.

Petitioner's argument is an insult and an outrage. It impugns the integrity of our Courts. It refuses to recognize that the rulings below are the result of petitioner's failure to present any proof of improper conduct by the Shareholders. The Petition for a Writ of Certiorari should be summarily denied and sanctions imposed for the filing of this frivolous Petition.

B. Rulings Below.

A Complaint in this cause was filed in the United States District Court for the District Court of New Jersey, based upon diversity jurisdiction, on December 28, 1990. The Complaint alleged that the Shareholders of Stacey Allison fraudulently induced Einziger to enter into an Employment Agreement with Stacey Allison in a scheme to steal his customer base. Einziger sought to avoid the contract and impose individual liability against the Shareholders for fraud. The federal lawsuit was stayed from October 7, 1991 to September 1994 pending resolution of Einziger's arbitration proceeding against Stacey Allison, a New Jersey corporate entity, which had been filed on December 10, 1990 and requested damages, including unpaid salary under the Employment Agreement.[3]

Summary judgment was entered by the District Court in favor of the Shareholders on January 26, 1995 dismissing Einziger's Complaint and denying his cross-motion for summary judgment. Einziger unsuccessfully appealed to the United States Court of Appeals for the Third Circuit which affirmed in a "judgment order" and thereafter summarily denied petitioner's suggestion for rehearing *en banc*.

Petitioner contends that the District Court's dismissal of his claims, and the Third Circuit's affirmance, were in conflict with decisions of this Court. Pet.5. Respondents maintain that

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[3] A comprehensive discussion of the arbitration proceedings will be provided in the Counterstatement of the Case, *infra*.

the proceedings below constituted a routine application of summary judgment procedure to a particular set of facts.

C. The Employment Relationship.

In early 1990, the Shareholders, entered into a business venture to form a corporation to manufacture and sell pot-pourri and related gift items. Arthur Jacobs, a shareholder, entered into discussions with Einziger for the purpose of employing Einziger as Senior Vice President of Operations for the corporation. At the conclusion of extensive negotiations on July 1, 1990, Einziger entered into an Employment Agreement with Stacey Allison. The Employment Agreement contained a clause that New York's substantive law would govern any dispute arising out of the contract and a broad form arbitration clause requiring arbitration of any controversy or claim arising out of or relating to the contract or any breach thereof. Following four months of inept stewardship, Einziger's employment with Stacey Allison was terminated on November 9, 1990.

D. The Arbitration Proceedings.

On December 10, 1990, Einziger filed a Demand for Arbitration which alleged that Stacey Allison's termination of his employment breached the terms and conditions of his Employment Agreement. Einziger sought damages including lost salary and benefits allegedly due him under the Employment Agreement. On December 28, 1990, Einziger filed a lawsuit in the United States District Court for the District of New Jersey against the Shareholders in their individual capacities for fraudulent inducement of the identical contract which he sought to enforce in the arbitration. The District Court's subject matter jurisdiction was purportedly premised upon diversity of citizenship. (Einziger, a New Jersey resident, failed to join Stacey Allison, a New Jersey corporation, as a party to the litigation.) On October 7, 1991, the District Court

indefinitely stayed its proceedings pending resolution of the arbitration.

Hearings in arbitration continued through 1993. Einziger submitted all proofs relevant to his breach of contract claim against Stacey Allison. Of equal import Einziger admittedly argued, although he did not formally allege, fraudulent inducement of the Employment Agreement during the arbitration. In September 1993, the arbitrators determined that Stacey Allison had breached the Employment Agreement, thereby establishing its validity, in terminating Einziger's employment and awarded $614,753 in damages, including attorneys' fees.

E. Judicial Proceedings Before the District Court.

Following entry of the arbitration award, the United States District Court removed its stay of the proceedings. Einziger sought to assert individual liability against the Shareholders for the judgment entered against Stacey Allison. On January 3, 1995, Einziger was granted leave to amend his Complaint which had averred that the Shareholders had fraudulently induced his execution of the Employment Agreement in a supposed effort to pilfer his customers. The amendment merely set forth events, including the arbitration, which had occurred after the filing of the original Complaint. The Amended Complaint was devoid of any allegation averring an alter ego theory of individual liability. The Shareholders were also granted leave to amend their Answer to interpose the arbitration as a defense to the federal litigation.

Einziger moved for summary judgment. In support of the motion he submitted material which had been presented in the arbitration. He argued that the Shareholders had controlled and paid for the arbitration and were therefore bound by the result. However, he submitted no evidence in support of that contention.

The Shareholders moved to dismiss the Complaint as it sought to declare invalid a contract which had been found valid in arbitration and because Einziger had contractually agreed to bring claims in arbitration and was therefore barred from litigating in federal court.

The District Court entered judgment in favor of the Shareholders, dismissed Einziger's Complaint and denied his cross-motion. The District Court correctly ruled in favor of the Shareholders, holding that: (1) given the broad form arbitration clause in the Employment Agreement, Einziger's failure to assert the fraudulent inducement claim against Stacey Allison or its Shareholders in the arbitration proceeding served as a bar to litigation of the identical issue in the subsequent federal court proceeding; and (2) Einziger was judicially estopped, pursuant to New York law, from asserting that the Employment Agreement was vitiated by fraud after successfully obtaining an award in the arbitration premised upon the contract's validity. Pet.App.8a.

Without discussion, the District Court rejected Einziger's cross-motion which alleged that the Shareholders had engaged in corporate impropriety, controlled/financed the previous arbitration proceedings on behalf of Stacey Allison and were liable for the judgment entered against the corporation. Einziger had utterly failed to submit any proofs showing impropriety, control or financing by the Shareholders.

On September 20, 1995, the United States Court of Appeals for the Third Circuit summarily affirmed the District Court's order without opinion and rejected Einziger's Suggestion for Rehearing *En Banc* on November 17, 1995. An Order in lieu of Mandate was entered in the United States District Court for the District of New Jersey on December 22, 1995. RA1a. The instant Petition for a Writ of Certiorari was docketed on December 19, 1995.

REASONS FOR DENYING THE WRIT

I. THE UNPUBLISHED DECISION OF THE DISTRICT COURT BELOW, AS SUMMARILY AFFIRMED BY THE THIRD CIRCUIT COURT OF APPEALS, DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

A. Introduction.

While Einziger argues that the decisions of the Courts below conflict with the decision of this Court in *Montana v. United States*, 440 U.S. 147 (1979) (Pet.7) and other precedent, the Third Circuit's unpublished September 20, 1995 decision does not conflict with any decision of this Court, nor that of any other Court of Appeals, and consequently does not call for review. *See* Supreme Court Rule 10(a) and (c).

Einziger urges that the Shareholders controlled the arbitration and are therefore personally bound by the result. Neither the District Court nor the Third Circuit Court of Appeals discussed this contention; hence there is no conflict with existing decisional law on the issue. Moreover, the courts below refrained from dealing with this argument because there is absolutely nothing in the record to support it. Although petitioner's counsel *said* in his brief and in oral argument that the Shareholders controlled and paid for the defense of the arbitration, he produced no proofs to support this statement.

In any event, even if petitioner could point to a conflict between the Third Circuit's decision and that of this Court, which he has utterly failed to do, he would still be required to establish that the conflict was of an "intolerable" nature which must be both "direct and apparent." *See* R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice* (7th ed. 1993) at §§ 4.3; 4.4; and 4.5. Such a serious conflict cannot be demonstrated as the District Court said nothing in its unpublished opinion with respect to the issue which suppos-

edly establishes the conflict and the Third Circuit Court of Appeals said nothing at all, save "affirmed." The argument of "conflict" is nothing more than an effort to fabricate, out of whole cloth, an issue which does not exist within the record.

Einziger attempts to avoid his lack of proof by arguing that there was some sort of judicial conspiracy against him. Einziger's irrational "conspiracy" allegations are palpably ludicrous. Absent any proof on the averred "issue", the District Court and Third Circuit Court of Appeals properly ignored his contentions.

B. Discussion.

Einziger argues that the courts below have decided the matter at bar differently from *Montana v. United States*, 440 U.S. 147 (1979), which he cites for the proposition that "[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right . . . is as much bound . . . as he would be if he were a party of record." *Id.* at 154. The lower courts' decisions do not conflict with *Montana* or any of the other authority of this Court cited in Einziger's petition[4], because no proof was ever adduced that the Shareholders engaged in the proscribed conduct. The record in the courts below was vastly different from that considered by this Court in previous cases in which the Court found it appropriate to bind a non-party by a judgment.

In *Montana*, a contractor challenged the constitutionality of a state tax levied against public contractors. The state courts held the tax to be constitutional. The United States then instituted suit to set aside the tax statute. Montana claimed that the government was bound by the earlier litigation. The government stipulated that it had (i) required the original lawsuit's filing; (ii) reviewed and approved the Complaint; (iii) paid the attorneys' fees and costs of the litigation;

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[4] *Souffront v. La Compagnie des Sucereies de Puerto Rico*, 217 U.S. 475 (1910) and *Lovejoy v. Murray*, 3 Wall (U.S.) 1 (1865)

(iv) directed the appellate practice; (v) submitted a brief as *amicus curiae*; and (vi) compelled the contractor to abandon the appeal. The government also conceded that it was the real party in interest in the first litigation. In this context, this Court held the United States to be bound by the result of the prior suit. *Montana*, 440 U.S. at 154.

As previously adverted to, none of the dispositive factors present in *Montana* are contained in the record here. There was no proof that the Shareholders either financed or controlled the arbitration. The bald assertions of petitioner's counsel were no substitute for evidence and could not save his Complaint from summary dismissal. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (holding that a party opposing summary judgment may not rest on mere allegations; it must present actual evidence that creates a material issue of fact). Although the petitioner argued for the application of the rule of law contained in *Montana*, Einziger failed to supply the factual predicate necessary in order that *Montana* be controlling precedent.

Souffront involved a plaintiff's second attempt to claim title to realty in Puerto Rico. The plaintiffs had initiated an action in the courts of Puerto Rico against sellers of realty claiming title to the property at issue. The sellers had sold the property to a third party before the inception of the lawsuit but defended the litigation, as required by the contract of sale, at the direction of the third party buyers to free the realty's title from any cloud. The Puerto Rican court ruled in favor of the nominal defendants, the sellers, who openly represented the interests of the third party buyers.

In the second suit in federal court, the plaintiffs sought to re-litigate the title issue directly against the third party buyers who were not nominal parties to the original Puerto Rican litigation and the suit was dismissed on *res judicata* grounds. This Court, in affirming the dismissal, held that the third party buyers were entitled to avail themselves of the judgment rendered in favor of the sellers because they had ostensibly

controlled the litigation for their own benefit. *Souffront*, 217 U.S. at 485.

Again, all of the facts concerning the actions, identities and interests of the parties in the first litigation were before the court in the second litigation.

In *Von Opel v. Brownell*, 244 F.2d 789, 791-792 (D.C.Cir. 1957), the District Court had previously determined that the principal's corporation was an enemy of the United States government. The corporate principal was foreclosed from relitigating this determination because he, admittedly, had full control of the litigation, retained counsel and authorized prosecution of the appeal as the entity's representative to protect his own financial interests in the first litigation. Accordingly, the District Court dismissed his individual intervention complaint under *res judicata* principles.

The remaining cases cited by petitioner, *Explosives Corp. of America v. Garlam Enterprises Corp.*, 817 F.2d 894, 904-905 (1st Cir. 1987); *Alman v. Danin*, 801 F.2d 1 (1st Cir. 1986); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984); *In re Gottheiner*, 703 F.2d 1136 (9th Cir. 1983); and *Drier v. Tarpon Oil Co.*, 522 F.2d 199 (5th Cir. 1975), are alter ego cases. In each matter, the controlling shareholder of a corporation treated the corporation as his personal property and ignored corporate formalities. The proofs showed that the shareholder controlled, directed and financed the litigation which he then sought to disavow, ignored the separate existence of the corporation and even preferred himself over other creditors of the corporation. In such circumstances, Courts correctly held that the shareholder was the alter ego of the corporation and bound by a judgment against the corporation. The findings of *res judicata* were made only where the record reflected financial and strategic control over the previous litigation.

It is a fundamental principle of corporate law that if the Shareholders are to be bound as alter egos, they must be

proved to be alter egos. Petitioner's counsel's specious allegations could not rescue Einziger's Complaint from dismissal. Simply put, Einziger's theory was meritless and unworthy of comment.

II. THE PETITION FOR CERTIORARI DOES NOT PRESENT SPECIAL AND IMPORTANT REASONS FOR THE EXERCISE OF THIS COURT'S JURISDICTION.

The decision below also does not warrant review by this Court as it does not exhibit any of the "special and important reasons" necessary for issuance of a writ of certiorari. *See* Supreme Court Rule 10. This case does not present (1) a conflict with this Court's precedents or decisions of other Circuit Courts of Appeals (as previously discussed); (2) a departure from accepted or usual course of judicial proceedings compelling the exercise of this Court's supervisory powers; or (3) a decision addressing an important question of federal law that should be decided by this Court. *Id.* Factors of a magnitude which would ordinarily compel certification review are absent from this litigation.

The Third Circuit's unpublished decision merely affirmed, without comment, a routine, unpublished decision of the District Court granting summary judgment. The District Court was serving the function of a state court in a matter founded on diversity jurisdiction. It interpreted state common law regarding (i) arbitrability of a fraud claim against non-signatory shareholders of a corporate entity which was a party to an arbitration agreement; (ii) estoppel principles barring a litigant's efforts to recover on two inherently inconsistent causes of action alleged in separate proceedings; and (iii) application of an unplead alter ego theory where the record was devoid of any evidence that the Shareholders engaged in corporate impropriety or abuse of the corporate formality. *See Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938) (holding

that federal courts must apply state substantive law when adjudicating issues arising under their diversity jurisdiction).

Because the district court proceedings below did not involve any novel or significant federal constitutional or statutory questions, the district court's opinion contains only a straight-forward application of the summary judgment standard to the petitioner's state law causes of action and a particular set of facts. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) (indicating that considerable deference afforded to lower federal courts' interpretation of state laws); *See also* R. Stern, E. Greisman and S. Shapiro, *Supreme Court Practice* (7th ed. 1993) § 4.3 (commenting that certification review is ordinarily inappropriate when a lower federal court is making a determination of state law as it rests upon adequate non-federal grounds).

III. THE LOWER COURTS' CORRECT APPLICATION OF STATE SUBSTANTIVE LAW DOES NOT WARRANT EXERCISE OF THIS COURT'S JURISDICTION.

It is submitted that the district court's opinion, as affirmed by the Third Circuit, was a correct application of New York substantive law to the case as pled. The argument of the case below departed substantially from the pleadings. The Complaint alleged fraud in the inception of the Employment Contract. There was no allegation that the Shareholders were alter egos of Stacey Allison. Petitioner's argument was primarily addressed to the alter ego theory of *Montana v. United States*, *supra*, without any factual proofs supporting the theory.

Conspicuously absent from Einziger's petition is any substantive discussion of the District Court's opinion which held that (1) presented with a broad form arbitration clause, claims for fraudulent inducement are subject to arbitration and (2) petitioner was estopped from asserting that he had been

fraudulently induced into entering the Employment Agreement where he had previously obtained a breach of contract award against Stacey Allison establishing its validity. Pet.App.5a, 6a and 7a.

Although the initial portion of the District Court's holding applied principles of arbitrability under the Federal Arbitration Act, 9 U.S.C. §§ 1-15, those same principles are consistent with New York law compelling arbitration of claims for alleged fraudulent inducement of the entire agreement. Pet.App.6a. *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*, 388 U.S. 395, 403-404 (1967); *S.A. Mineracao Da Trindade Samitri v. Utah Int'l, Inc.*, 745 F.2d 190, 195 (2d Cir. 1984); *In re Weinrott*, 32 N.Y.2d 190, 198-199, 344 N.Y.S.2d 848, 298 N.E.2d 42 (1973). Thus, any claim of fraud against the corporation is arbitrable.

The District Court's finding that non-signatories, such as officers and directors of a corporation, to an arbitration clause were subject to arbitration of claims against them was equally consistent with New York substantive law. Pet. App.6a. *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110, 1121 (3d Cir. 1993); *In re Neirs-Folkes, Inc.*, 75 A.D.2d 787, 788, 428 N.Y.S.2d 248 (1980), *aff'd*, 53 N.Y.2d 1038, 442 N.Y.S.2d 487, 425 N.E.2d 875 (1981) (rejecting attempt to circumvent arbitration clause by naming directors and officers in their individual capacities in a separate litigation arising out of dispute governed by broad form arbitration clause as "contrary to established policy of [New York] state."). Under these well-settled federal and state law principles, claims against the Shareholders were subject to arbitration despite their non-signatory status to the Employment Agreement.

Einziger also admitted below that the identical constellation of facts submitted to the arbitrators in support of his breach of contract recovery were to be submitted as the basis of recovery for fraudulent inducement of the very same Employ-

ment Agreement in the District Court proceeding. Petitioner's chameleon-like litigation tactics were rejected by the Third Circuit under state law judicial estoppel principles. Pet.App.6a. *See Economu v. Borg-Warner Corp.*, 652 F.Supp. 1242, 1250 (D.Conn. 1987), *aff'd*, 829 F.2d 311 (2d Cir. 1988) (interpreting New York law) (holding that "[p]laintiff was given the opportunity to litigate his claims under the contract at arbitration and, in fact, relied on the validity of that contract as a basis for his claims. He cannot now be heard to claim that it is invalid as a result of fraudulent inducement.") (citation omitted).

In short, petitioner ratified the Employment Agreement in successfully prosecuting his breach of contract claim against Stacey Allison in the arbitration and was properly foreclosed from disavowing the identical contract in the subsequent federal court litigation. It is submitted that the decisions below are a correct application of the law to the pleadings and to the evidence presented. It is also submitted that the alter ego theory, while argued, was not before the courts below as there was no proof offered.

Not only is the Third Circuit's decision consistent with this Court's precedent, but it also appropriately applied state substantive law in disposing of the issues presented. Accordingly, the petition does not warrant grant of this Court's exercise of jurisdiction.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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January 17, 1996

APPENDIX

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Order, *Einziger v. Jacobs, Heller, Black and Jacobs*, Civ. Action No. 90-4779 (D.N.J. order of Judgment on the Mandate filed December 20, 1995) RA1a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Original Filed December 20, 1995
Civil Action 90-4779 (AET)

MARK EINZIGER,

Plaintiff,

—v.—

ARTHUR JACOBS, DONALD HELLER, ELLIOT BLACK and KENNETH JACOBS,

Defendants.

ORDER OF JUDGMENT ON THE MANDATE

Pursuant to the Certified Judgment Order issued in lieu of a Formal Mandate by the United States Court of Appeals for the Third Circuit entered on November 17, 1995 and heretofore filed in these proceedings:

IT IS on this day 19th of December 1995,

ORDERED THAT:

1. After consideration of all contentions raised by appellant it is hereby adjudged and ordered that the judgment of this district court entered January 26, 1995 was AFFIRMED; and

2. An Order on the Mandate is hereby ENTERED terminating the above-captioned proceedings with prejudice.

/s/ ANNE E. THOMPSON
Hon. Anne E. Thompson, C.U.S.D.J.